

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 454 738
Issued to: William H. Duncan Z-231 327

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2211

William H. Duncan

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 5 September 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for two months on nine months' probation, upon finding him guilty of negligence. The specification found proved alleged that while serving as operator on board the tug KATHRYNE E. MCALLISTER, under authority of the license above captioned, at or about 0100, 28 November 1978, Appellant failed to navigate said vessel and its tow, the tank barge CIBRO PHILADELPHIA, with due caution, resulting in the grounding of CIBRO PHILADELPHIA on Mill Rock, East River, N.Y., and the subsequent discharge of 942 barrels of #2 oil into the East River.

The hearing was held at New York, New York, in four sessions during March and April, 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness and four exhibits.

In defense, Appellant offered in evidence his own sworn testimony and two exhibits.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He served a written order on Appellant suspending his license for a period of two months on nine months' probation.

The entire decision was served on 18 September 1979. Appeal was timely filed on 5 October 1979 and perfected on 7 January 1980.

FINDINGS OF FACT

On 28 November 1978, Appellant was serving as operator on board the tug KATHRYNE E. McALLISTER and acting under authority of his license while the vessel was underway in the port of New York.

Appellant is an experienced mariner, with a long history of successful pilotage in the New York Harbor area. He has piloted vessels of all sizes through Hell Gate, beginning in 1944.

Tug KATHRYNE E. McALLISTER is a twin screw towing vessel about 100 feet in length, of 4,500 horsepower. She is equipped with twin rudders, and at the time in question drew 14.6 feet.

Tank Barge CIBRO PHILADELPHIA is 425 feet long with a beam of 74.6 feet, drawing about 31 feet on the critical date.

Tub J.P. McALLISTER is a 2,400 horsepower, single screw towing vessel.

On the evening of 27 November 1978, KATHRYNE was bound from Bayway, New Jersey, to New Haven, Connecticut, via Hell Gate, pushing CIBRO in the notch. Departure was timed so as to clear Hell Gate within 30 minutes of slack water. J.P. accompanied the flotilla, keeping a slack hawser fast to the starboard bow of CIBRO. Appellant was in charge of the flotilla.

During the passage up the East River the flotilla encountered varied tide and current conditions with no untoward results. Other river traffic was encountered enroute and passages arranged, both meeting and overtaking.

When the flotilla reached the vicinity of East 80th Street, Manhattan, Appellant was in contact with the tug EVENING TIDE which was west bound, towing a tank barge astern on a hawser 50 to 100 feet long. An exchange of one whistle signal and a port to port passage was agreed upon.

TIDE is about 100 feet long and was drawing about 15 feet at the time. Her tow was drawing about 4 feet and was 340 feet long and 74.3 feet in beam.

When KATHRYNE reached the northern end of Roosevelt Island the flotilla was slightly right of the channel centerline, making six knots through the water and about four knots over the ground, stemming the ebb current. Bare steerageway for the flotilla could be maintained at a speed through the water of about 2-3 knots.

The TIDE flotilla was making ten knots, with the current under foot, when it reached the area off East 90th Street and turned, heading directly for the KATHRYNE flotilla. Appellant experienced some apprehension because of the close approach of the TIDE

flotilla.

Off East 86th Street the flotillas cleared each other on reciprocal courses, at a distance of 15 feet, near the center of the channel. Shortly thereafter CIBRO sheered left. Appellant put his rudders to the right, to no avail, as the sheer increased. Appellant caused the assist tug, J.P., to back full and take a strain on the hawser to CIBRO's starboard bow. Appellant also backed his starboard engine. The westerly current set off Hallet's Point caused a progressively greater sheer despite Appellant's efforts. Appellant rang up full astern on both his engines, but was unable to avoid grounding on Mill Rock at about 0108, at a speed of 2 knots, on a northerly heading.

As a result of the grounding 942 barrels of #2 oil was lost from CIBRO into the East River. The grounding was not attributable to mechanical failure or weather conditions.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant asserts several grounds for appeal. Essentially he contends that the Administrative Law Judge improperly applied a presumption of fault in the face of uncontradicted rebuttal evidence and referred to matters outside the record to find the charge proved.

APPEARANCE: McHugh, Heckman, Smith & Leonard of New York, by James M. Leonard, Esq.

OPINION

It is well established that a presumption of negligence arises when a vessel grounds on shoals which are designated on the appropriate navigational charts. It is equally clear that the presumption is rebuttable. The effect of the presumption is to shift the burden of going forward with the evidence to the Respondent in an R.S. 4450 proceeding. It does not, however, alter the Investigating Officer's burden of proof. Appeal Decision No. 2034.

In appropriate circumstances the presumption alone may be sufficient to prove a case of negligence. Such is not the case, however, when competent rebuttal evidence is adduced showing the lack of fault of the party against whom the presumption operates.

A party charged with negligence is not obligated to establish lack of negligence, merely because a presumption exists; his obligation is to rebut the presumption by such evidence as will

show his due care under the circumstances. Appellant successfully rebutted the presumption. The Investigating Officer was then obligated to prove two essential points. First, that some standard of conduct existed which governed Appellant's conduct. Second, that Appellant breached the applicable standard, thereby resulting in the grounding. Appeal Decision No. 2086.

On the first point, the record is devoid of any competent evidence to establish a standard of conduct. The government clearly relied on the presumption alone, as the exhibits are more or less neutral, and the Investigating Officer's witness was actually favorable to Appellant.

On the second point, the Administrative Law Judge's opinion found a breach of some standard by relying primarily on the speed of Appellant's flotilla, his position near the center of the channel, and his professional knowledge of the effect of a close passage to find the requisite fault to support a finding of guilty.

In the fact, the three bases for the finding of fault spring virtually full grown from the closing statement of the Investigating Officer, despite the absence of evidentiary foundation. TR-132-34. Appellant's uncontradicted testimony on the subject of speed was to the effect that his speed was proper and appropriate. TR-109. The testimony of the government's witness bolstered this view. TR-54, 60. Only in the Investigating Officer's summation did the spectre of excess speed as the basis of fault arise. TR-134. The testimony adduced with respect to Appellant's position near the center of the channel was favorable to Appellant in light of the prevailing current conditions and another flotilla which was overtaking him on his starboard side. TR-46, 48-9, 56-4, 60. The effect of a close passage, although known to Appellant, was never conceived of during the hearing as a basis for fault, since the testimony demonstrated that such a near passage was not required and Appellant did not know that the TIDE flotilla would attempt such a close passage. TR-52-4. Mere statements by an Investigating Officer are insufficient to prove a charge of negligence. They do not meet the regulatory requirement of substantial evidence of a reliable and probative character. 46 CFR 5.20-95(b). Mere speculation is not an acceptable predicate for findings. Appeal Decision No. 2152. To rely on such assertions is arbitrary and capricious, and constitutes clear error of law. The evidence adduced by the Respondent established lack of negligence on his part, which precluded application of the presumption, and the burden of proceeding was thus back on the shoulders of the Investigating Officer. Put concisely, the burden of proof is always on the Investigating Officer. The presumption shifts only the burden of going forward with evidence sufficient to rebut the presumption and Appellant clearly met his burden. See 46

CFR 5.20-77.

CONCLUSION

Findings of fact critical to the ultimate finding of negligence on this case are not based on substantial evidence of a reliable and probative character. Absent such support in the record, the findings must fall, as does the determination of negligence.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 5 September 1979, is VACATED and the charges DISMISSED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 22nd day of May 1980.

INDEX

Evidence

- Effect of presumption

Grounding

- Burden of proof

- Presumption as proof of

- Effect of presumption

Negligence

- Presumption as proof of

- Burden of proof

Presumption

- Effect of; rebuttal